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UK Government
Department for Business, Energy and Industrial Strategy

Consultation on measures to extend the ban on exclusivity clauses in contracts of employment

QUESTION ONE

The Government is proposing extending the ban on exclusivity clauses to make them unenforceable in contracts where the guaranteed weekly income is below the Lower Earnings Limit, currently £120 a week and equivalent to 13.76 hours worked at the National Living Wage. Do you agree the ban of exclusivity clauses should be extended to low-income workers where the guaranteed weekly income is below the Lower Earnings Limit?

Yes.

As the Government notes in the Consultation document, ‘building back better’ from the Covid-19 pandemic is a crucial policy challenge. Improving the lives of low-income workers should be a central element of this policy objective.

Clauses that purport to restrict workers with insufficient hours from working for other employers should be banned.

This prohibition is unlikely to be effective without further reform, however, since it relies on low-paid workers to challenge their employers at an employment tribunal. Few will have the financial resources or time to enforce their rights in this way.

Further, such ‘exclusivity clauses,’ are not the key challenge for the legal regulation of low-waged work. Such a ban would not address significant challenges faced by low-income workers. A crucial problem for many of these workers is that they are guaranteed too few working hours to secure a decent livelihood. A central objective for the future of working life in the UK is therefore to ensure that jobs provide sufficient hours for workers to earn a decent living. Legal regulation can play a role in achieving this objective.

UNACCEPTABLE FORMS OF WORK (UFW): THE WORKING TIME DIMENSION

My research has produced a model Unacceptable Forms of Work (Deirdre McCann and Judy Fudge 'Unacceptable Forms of Work: A Multidimensional Model' (2017) 156(2) *International Labour Review* 147-306).¹ This model identifies central features that render work unacceptable.

Working time is a key dimension of this model of Unacceptable Forms of Work. In particular, the model includes insufficient working hours as an indicator of Unacceptable Work. Insufficient hours are defined as working hours that do not allow a worker to satisfy basic needs.

Another dimension of unacceptable working hours is working time insecurity. This arises where a worker experiences significant variation in their working hours. It can take the form of short notice of work schedules, for example, or unexpected changes. Also, a worker may lack influence over her working hours, including where she lacks the flexibility to deal with family and community obligations.

The proposed exclusivity ban does not target the problem of unpredictable schedules. An exclusive working relationship is as likely to be generated by the complexities of combining two jobs with unpredictable schedules as by an express contractual clause. Workers may feel compelled to work exclusively with their current employer – even though they do not have the hours that they need – because their work schedules are too unpredictable to combine with working for another employer. This problem cannot be resolved through banning 'exclusivity clauses.'

NEW LEGAL APPROACHES ARE NEEDED

Innovative legal approaches are needed to improve and eliminate low-waged work.

McCann and Murray have identified a set of 'framed flexibility' mechanisms (Deirdre McCann and Jill Murray *The Legal Regulation of Working Time in Domestic Work* (UN International Labour Organization, 2010).² These include a requirement for workers to be given notice of schedules and overtime; incentives to employers to convert fragmented schedules into continuous hours; compensation for short or cancelled call-out periods; and counting in-shift travel periods as working time.

¹ Available at <https://onlinelibrary.wiley.com/doi/full/10.1111/ilr.12002>.

² Available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_150650.pdf.

Another central policy idea is for the law to require that workers are guaranteed a specified number of working hours or income.

THE VITAL ROLE OF EFFECTIVE ENFORCEMENT

Even if these kinds of measures are adopted, a remaining challenge to regulatory frameworks on decent work is effective enforcement. Individualised enforcement is insufficiently deterrent and does not have substantial effects across a labour market. Vulnerable workers are unlikely effectively to enforce their legal rights.

More promising strategies are available. Business representatives and trade unions could be required, for example, to develop sector-specific agreements on decent work. Most effectively, negotiation on working hours and wages can be required through collective bargaining and employee consultation mechanisms.

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